

GILL SPERLEIN (CSN: 172887)
121Capp Street, Suite 200
San Francisco, California 94110
Telephone: (415)487-1211 X32
Facsimile: (415) 252-7747
legal@titanmedia.com

Attorney for Plaintiff
IO GROUP, INC.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

IO GROUP, INC., a California corporation,)	CASE NO:C 02-3711 RMW
)	
Plaintiff,)	APPLICATION FOR DEFAULT
)	JUDGEMENT BY COURT AND
vs.)	MEMORANDUM OF POINTS AND
)	AUTHORITIES IN SUPPORT OF
DAVID FOREST, an individual, FOREST)	APPLICATION FOR DEFAULT
ENTERPRISES, aka DAVID FOREST)	JUDGEMENT BY COURT
ENTERTAINMENT, a business entity type)	
unknown, JACK RINELLA, an individual,)	
and RINELLA SERVICES, a business)	
entity type unknown,)	
)	
Defendants.)	
)	

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STATUTES

17 U.S.C. § 504.....4, 6, 11

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Cal. Civ. Code § 3344 (a) and (g)9, 10, 11

APPLICATION FOR DEFAULT JUDGEMENT BY COURT

Upon the Court's instruction this application is submitted on the documents, without hearing. By this application, the Memorandum of Points and Authorities Supporting the Application, the accompanying declarations and the pleadings in this action Plaintiff presents proof of the following matters:

1. Defendants David Forest and David Forest Enterprises has not responded to the complaint within the time permitted by law. (Sperlein Decl. ¶¶ 2-6).

2. A clerk's default was entered herein on February 26, 2003. See Request to Enter Default.

3. Defendant David Forest and David Forest Enterprises is not an infant or incompetent person or in military service or otherwise exempted under Soldiers' and Sailors' Civil Relief Act of 1940. Sperlein Decl. ¶9.

4. Notice of this application has been served on Defendant. See Certificate of Service filed herewith.

5. Plaintiff is entitled to judgment against said defendant on account of the claims pleaded in the complaint, to wit: Copyright Infringement, Unfair Competition, Unauthorized Use of a Photograph (Misappropriation of the Right of Publicity).

6. The amount of judgment sought is the sum of damages at \$245,000.00 (minimal), sanctions at \$2,557.00, costs at \$150.00 and attorney fees at \$1,799.50 for a total of \$249,506.50 (minimal). Support cited herein.

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF APPLICATION FOR DEFAULT JUDGEMENT BY COURT**

Plaintiff Io Group, Inc. relies on the following points and authorities in support of its Application for Default Judgment by Court in the amount of \$249,506.50, minimally:

ISSUES TO BE DECIDED

This memorandum supports Plaintiff's Application for Default Judgment by the Court. At an Order to Show Cause Hearing on March 14, 2003, the Court instructed Plaintiff to submit the application for decision on the papers without a hearing. The Clerk has entered Default against Defendant, so liability is no longer at issue. The remaining issues are the amount of damages for each of Plaintiff's claims and whether damages should be enhanced because Defendant acted willfully.

STATEMENT OF FACTS

Plaintiff Io Group, Inc. is in the business of producing adult videos and also maintains a subscription-based website. Defendants David Forest and David Forest Enterprises are apparently one and the same and will be referred to in the singular here forth. Defendant is in the business of acting as an unlicensed talent agent for various actors who appear in adult videos. Defendant also operates a subscription-based website where he displays numerous images of the actors he represents.

Defendant illegally published on his website www.forestmen.com twenty (20) images that belong to Plaintiff and for which Plaintiff holds valid Certificates of Registration. Plaintiff delivered six (6) of these images to Defendant with Terms of Use specifically stating they could

1 only be used on the Internet if they contained Plaintiff's watermark. The document further stated
 2 that if Defendant used the images in a manner inconsistent with its terms, he would have to pay a
 3 minimal licensing fee of \$2,500.00 per image. In addition to the specific Terms of Use delivered
 4 with the images, Plaintiff had earlier discussions with Defendant as to how its images were to be
 5 property credited and protected.
 6

7 Nonetheless, Defendant proceeded to ignore the instructions and use the images in a
 8 manner inconsistent with Plaintiff's Terms of Use. In addition, Defendant scanned other Plaintiff-
 9 copyrighted images from a magazine layout and posted those to his website as well. He further
 10 violated Plaintiff's copyright by publishing another Plaintiff-copyrighted image in a print
 11 advertisement announcing a live appearance of the actor who was the subject of the images.
 12

13 Plaintiff sent a Cease and Desist letter to Defendant but the images remained accessible on
 14 the Internet until after this action was filed.
 15

16 As stated above, Defendant failed to answer the Complaint and the Clerk has subsequently
 17 entered default against him.
 18

19 **ARGUMENT**

20 DAMAGES FOR COPYRIGHT INFRINGEMENT

21 Plaintiff requests that the Court enter a judgment against Defendant for twenty (20) acts of
 22 copyright infringement at a minimum of \$2,500 per act equaling a base statutory damage award of
 23 a minimum of \$50,000, trebled to a minimum of \$150,000.00 because Defendant acted willfully.
 24

25 As well-pleaded in the complaint and thereby admitted by Defendant by his default (see
 26 *Nishimatsu Construction Co., Ltd. V. Houston Nat'l Bank*, 515 F2d 1200,1206 (5th Cir. 1975); and
 27 *Danning v. Lavine*, 572 F2d 1386, 1388 (9th Cir. 1978)) David Forest illegally copied and
 28 published on the website www.forestmen.com a total of nineteen (19) images owned and

1 copyrighted by Io Group, Inc. and published 1 such image in a printed advertisement. (Complaint
2 ¶¶20 and 24; Webb Decl. ¶¶9 and 14.)

3 Under Federal law infringers of copyrights are liable for either the copyright owner's
4 actual damages and any additional profits of the infringer or statutory damages. The court may set
5 statutory damages from \$750 to \$30,000 per work as it considers just. 17 USC § 504.
6

7 Because Defendant failed to defend this action, discovery has not occurred and it is
8 therefore impossible for Plaintiff to determine the extent of actual damages with certainty.

9 For example, Plaintiff has no way of determining the amount of illicit profit Defendant has
10 earned. Unknown factors affecting this determination include the number of website memberships
11 resulting from the use of Plaintiff-owned photographs, the amount of income from bookings of the
12 actor as a result of the illegal use of the images, income earned by Defendant from the appearance
13 of the actor advertised by the use of a Plaintiff-owned photograph, and perhaps other factors
14 Plaintiff never uncovered due to the absence of discovery.
15

16 Moreover, without discovery it is impossible to determine the extent of Plaintiff's loss.
17 Because Defendant did not take any measures to protect the images from copying and
18 downloading, the images have undoubtedly been further distributed throughout the World Wide
19 Web, thereby diminishing the value of the images. By way of example, Plaintiff later discovered
20 these same un-watermarked images on at least one other website. (Webb Decl. ¶11.)
21

22 Ordinarily the value of these images to Plaintiff lies in their uniqueness. Plaintiff licenses its
23 images to magazine publishers or webmasters who seek new and unique images. Plaintiff sells
24 memberships to its website to customers who are attracted to the website by images they have not
25 viewed before. To the extent the images have been over-distributed they become less valuable.
26 Licensees or customers who have seen the images in other locations (perhaps for less money or
27
28

1 even free) will not be interested in paying Plaintiff for the use of the photos or the opportunity to
2 view them. Since the images published by Defendant did not contain Plaintiff's watermark or
3 copyright information, they do not even serve to increase brand recognition. (Webb Decl. ¶10.)
4

5 Because of the increased exposure caused by Defendant's careless use of the images, they now
6 have very little draw for new customers to Plaintiff's website and it would be nearly impossible to
7 license the images to any webmaster or print publisher. (Webb Decl. ¶12; Lahey Decl. ¶ 4.)

8 The only objective damage readily discernable is Plaintiff's minimum licensing fee of
9 \$2,500.00 per image. Defendant was aware this was Plaintiff's standard licensing fee. Plaintiff
10 sent six (6) of the illegally published images to Defendant with a Terms of Use Document
11 outlining the conditions under which Defendant was authorized to use the images. Those terms
12 specifically prohibited the use of the images on the Internet unless they were properly
13 watermarked. The Terms of Use specifically state, "You agree that compensation for
14 unauthorized use shall be no less than \$2,500.00 per image." (Emphasis added.)(Complaint
15 Exhibit D; Webb Decl. ¶¶ 8 and 9; Mills Decl. ¶¶ 2 to 8.) This information is also published on
16 Plaintiff's website. (Webb Decl. ¶ 3.)
17

18 The loss of the \$2,500.00 licensing fee represents some, but not all of Plaintiff's lost profits,
19 and does not represent any of Defendant's illicit gain. Because of the difficulties associated with
20 determining actual damages, Plaintiff elects to recover statutory damages.
21

22 For the reasons stated above, actual damages are certainly higher than just the lost
23 licensing fee of \$2,500.00 per image. Therefore, Plaintiff submits that the minimum amount to set
24 as a base statutory damage award for Plaintiff's copyright infringement claims is \$2,500.00 per
25 each of twenty (20) acts of infringement, or \$50,000.00 in total. Other Federal Courts have set
26 base damages much higher. *See Playboy v. Webbworld*, 968 F. Supp. 1171, 1176 (E.D. Tex.
27
28

1 1997) (Court awarded Playboy \$5,000 per image in Internet case). It bears repeating that this is
2 the minimum amount of damages and that actual damages may have been proven to be much
3 higher had the parties engaged in discovery.
4

5 DEFENDANT ACTED WILLFULLY

6 When a court finds an infringer acted willfully, the court may increase the award of
7 statutory damages to a sum of not more than \$150,000. 17 USC § 504(c)(1). As well-pleaded in
8 the complaint and thereby admitted by Defendant by his default, Defendant knew his actions
9 constituted copyright infringement and therefore his actions were willful. (Complaint ¶¶ 29 and
10 31.) The statutory damage award should be adjusted upwards accordingly.
11

12 On October 11, 1999 Plaintiff contacted Defendant by e-mail explaining that Plaintiff-
13 owned images appearing on his website must be properly credited. This correspondence related to
14 images not at issue in this action and occurred prior to the acts at issue in this action. (Webb Decl.
15 ¶4 and Exhibit A attached thereto.)
16

17 On January 6, 2000 Defendant responded to Plaintiff by e-mail stating that he believed he
18 was in compliance with copyright requirements. (Webb Decl. ¶5 and Exhibit B attached thereto.)
19

20 On January 7, 2000 Plaintiff sent Defendant a detailed e-mail message explaining why
21 Defendant was not in compliance, the reasons Plaintiff required images to be credited in a certain
22 manner, and a further request that Defendant rectify the situation. (Webb Decl. ¶6 and Exhibit C
23 attached thereto.)

24 The issue was resolved and there were no further problems relating to those images.
25 (Webb Decl. ¶ 7.) The communications between Plaintiff and Defendant concerning this earlier
26 act of infringement certainly make clear that defendant was fully aware his actions constituted
27
28

1 copyright infringement. Yet, within a year he engaged in substantially the same acts without any
2 regard for the intellectual property rights of Plaintiff.

3 On July 11, 2000 Plaintiff sent two sets of images, one set watermarked for Internet usage
4 and the other not watermarked for print use. Plaintiff also sent a Terms of Use document that
5 specifically described under what conditions Defendant could use the images and specifically
6 stating that only the water marked images could be used on the Internet. (Complaint ¶16 and
7 Exhibits C and D attached thereto; Webb Decl. ¶ 8; Mills Decl. ¶¶ 2-8.)

8 On or about September 13, 2001 during a routine inspection of Internet sites, an employee
9 of Plaintiff discovered nineteen Plaintiff copyrighted images of Chris Steel on the website
10 www.forestmen.com. A number of these were images delivered to Defendant with the Terms of
11 Use document described above. Defendant apparently had scanned the remaining images from a
12 magazine layout. (Webb Decl. ¶ 9.)

13 On September 21, 2001 Plaintiff sent by certified mail to Defendant a letter demanding he
14 cease and desist the infringement of Plaintiff's copyrighted photographs. A true and correct copy
15 of the letter is attached to the Complaint as Exhibit G. (Webb Decl. ¶ 13.)

16 In spite of that letter and several follow-up letters the images remained available on the
17 website until as late as June 20, 2002. Only after Defendant was served the Complaint did he
18 finally remove the images from his website. (Webb Decl. ¶ 15.)

19 Clearly, Defendant knew his actions constituted copyright infringement and therefore his
20 actions are to be deemed willful. Other Ninth Circuit Courts have not hesitated to impose heavy
21 sanctions in similar situations. *See Perfect 10 v. Talisman Communications, Inc.*, 2000 U.S. Dist.
22 LEXIS 4564 (C.D. CA. March 27, 2000). (Court awarded \$100,000.00 per image in case of
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24
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1 willful infringement of adult photographs on the Internet). Plaintiff requests the Court treble the
 2 base statutory award for a minimum of \$150,000.00.

3 DAMAGES FOR UNFAIR COMPETITION

4
 5 California Law defines an unfair business practice as, “any unlawful, unfair or fraudulent
 6 business act or practice and unfair, deceptive, untrue or misleading advertising ...”. Cal. Bus. &
 7 Prof. Code § 17200.

8 By systematically infringing on the intellectual property of others to create a website
 9 costing nothing to produce, Defendant unfairly competes with other website owners, such as
 10 Plaintiff, who must pay to produce content. These allegations were well-pleaded in the complaint
 11 and thereby admitted by Defendant by his default. (Complaint ¶¶ 34-37.)

12
 13 Defendant and many other webmasters like him, make profits by stealing the intellectual
 14 property of others and selling it as if it were their own. Businesses like Plaintiff who operate
 15 within the law must make large expenditures to create or properly license content. Plaintiff spends
 16 approximately \$41,738.00 per month in production costs. (Lahey Decl. ¶ 5.) Plaintiff must then
 17 recoup those expenditures and earn a profit by charging the appropriate fees to access the content.
 18 (Lahey Decl. ¶ 6.) It is impossible for Plaintiff to set competitive rates when competing with
 19 unscrupulous business like Defendant who pay nothing for their content. (Lahey Decl. ¶ 7.) This
 20 problem is rampant on the Internet. (Lahey Decl. ¶ 8.)

21
 22 Plaintiff has discovered a direct correlation between the closing of sites illegally using its
 23 images and increased subscriptions to its website. (Lahey Decl. ¶ 9.)

24
 25 Plaintiff believes that at trial it would have been able to prove Defendants did not license
 26 or acquire permission to use any of the hundreds of images appearing on their website. Each of
 27 those violations would have warranted a separate and distinct damage award because each time
 28

1 Defendants compete with Plaintiff by using illegally obtained images whether they belong to
 2 Plaintiff or someone else, they engage in an unfair business practice that causes Plaintiff harm.
 3 Nonetheless, Plaintiff only demands damages for those images that it is certain were illegally
 4 obtained - namely those images belonging to Plaintiff and being used by Defendant without
 5 permission.
 6

7 The statute provides that damages may be awarded up to \$2,500 for each violation. Cal.
 8 Bus. & Prof. Code § 17206(a). Defendant engaged in a minimum of twenty (20) violations
 9 thereby warranting a minimum damage award of \$50,000.00 for Unfair Business Competition.
 10

11 Since Cal. Bus. & Prof. Code § 17205 states that remedies or penalties provided for under
 12 the chapter are cumulative to each other and the remedies or penalties available under all other
 13 laws of California, Plaintiff submits that this amount should be included in the judgment in
 14 addition to any other damage awards. Cal. Bus. & Prof. Code § 17205.
 15

16 DAMAGES FOR UNAUTHORIZED USE OF PHOTOGRAPH

17 Cal Law provides that, “[a]ny person who knowingly uses another’s...photograph... in any
 18 manner, on or in products, merchandise, or goods or for purposes of advertising or selling, or
 19 soliciting purchases of products, merchandise, goods or services, without such person’s prior
 20 consent...shall be liable for any damages...equal to the greater of seven hundred fifty dollars
 21 (\$750) or the actual damages...Cal Civ. Code § 3344(a).
 22

23 As well-pleaded in the Complaint and thereby admitted by Defendants by their default, and
 24 as further supported by Exhibit F to the Complaint, the actor appearing in each of the photographs
 25 assigned his rights of publicity to Plaintiff. (Lahey Decl. ¶¶ 10 and 11.)
 26
 27
 28

1 Defendant did not have permission from Plaintiff to use the images in the manner they
2 were used (Webb Decl ¶ 16; Lahey Decl. ¶12.) and is therefore liable for unauthorized use of a
3 photograph.
4

5 Defendant published the images on a website for which he charged monthly membership
6 fees and thereby used the images for commercial gain. (Webb Decl. ¶ 17.)

7 Since the factual record has not been developed sufficiently to determine actual damages,
8 Plaintiff request the court assess damages at or above the minimum amount of \$750 per each
9 unauthorized use as provided for at Cal. Civ. Code § 3344(a).
10

11 For the same reasons set forth above relating to copyright infringement, Defendant's
12 unauthorized use of the photographs was willful and therefore Plaintiff requests punitive damages
13 as provided for under Cal. Civ. Code § 3344(a) and respectfully suggests that a trebling of the
14 damages would be appropriate. Plaintiff therefore requests a minimum damage award of
15 \$45,000.00 for defendant's twenty (20) willful acts of unauthorized use of a photograph.
16

17 Since Cal. Civ. Code § 3344(g) states that remedies provided for under the section are
18 cumulative, Plaintiff requests that this amount be included in the judgment in addition to any other
19 damage awards.
20

21 SANCTIONS

22 In an order issued by the Court on November 26, 2003 Defendant David Forest was
23 instructed to show cause why he should not be required to pay \$2,557.00 in sanctions for failing to
24 waive service of process. See Order Denying Defendant's Motion to Dismiss for Improper Venue
25 and Insufficient Service of Process; Order to Show Cause as to Why Defendant Should Not Bear
26 Costs of Service of Process.
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1 Defendant has failed to properly respond to the Court's Order to Show Cause. Therefore,
 2 the \$2,557.00 sanctions should be included in the judgment to be entered against Defendants.

3 COSTS AND FEES

4
 5 Plaintiff paid \$150.00 to file the Complaint in this action as indicated in the Bill of Costs
 6 attached as Exhibit A. (Sperlein Decl. ¶10.)

7 Plaintiff paid \$1,799.50 in fees to outside counsel relating to this case as outlined in the
 8 Schedule of Fees attached as Exhibit B. (Sperlein Decl. ¶11.) The attorney to whom these fees
 9 were paid, Kate Dyer, is a partner of the litigation firm of Clarence Snell and Dyer, graduated
 10 from Hastings Law School and has nearly ten years of litigation experience. Her regular hourly
 11 rate is \$295.00. (Sperlein Decl. ¶12.)

12 Since Plaintiff has been successful in its claims it should be awarded Costs and Fees as
 13 provided for by 17 U.S.C. § 504, California Bus. & Prof. Code § 17200 et. seq., and Cal. Civ.
 14 Code § 3344(a).
 15

16 None of these costs or fees is duplicative of the fees included in Plaintiff's request for
 17 sanctions as outlined above. (Sperlein Decl. ¶13.)
 18

19 **CONCLUSION**

20
 21 The Court should enter a Default judgment against Defendant for no less than \$249,506.50.
 22

23
 24
 25 Dated: March 21, 2003

/s/ Gill Sperlein

GILL SPERLEIN

GENERAL COUNSEL, IO GROUP, INC.

Attorney for Plaintiff Io, Group, Inc.
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